

ORIGINAL

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U.S. DISTRICT &
BANKRUPTCY COURTS

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH, MICHAEL)
B. HINCKLEY, JACQUELINE T.)
HLADUN, MARILYN J. CRAIG,)
JEFFERY P. CLEVINGER, and)
TIMOTHY C. KAUFMANN,)
individually and on behalf)
of those similarly situated,)

Plaintiffs,)

vs.)

MICRON ELECTRONICS, INC., a)
Minnesota corporation,)

Defendant.)

Case No. CIV 01-0244-S-BLW

PLAINTIFFS' STATEMENT
OF MATERIAL FACTS

During the course of discovery to-date, Defendant Micron Electronics, Inc., now known as Interland, Inc. (hereafter MEI), has taken the depositions of 32 individuals. There are still 17

PLAINTIFFS' STATEMENT OF MATERIAL FACTS, P. 1

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depositions scheduled to be taken between now and November 16, 2004, the date of the hearing on motions for final certification and/or de-certification. The deponents were each of the named plaintiffs and the majority of those former MEI employees who filed Consents to join this litigation. MEI also deposed a former MEI sales manager, Tawni Weaver.

While the individual testimony varied from deponent to deponent, several consistent themes emerged regarding MEI's failure to comply with the requirements of the Fair Labor Standards Act (FLSA). As explained and substantiated in more detail below, the following factual patterns consistently appeared in deposition testimony: (1) MEI employees worked off the clock in order to meet sales goals set by their managers; (2) MEI managers knew sales representatives were working off the clock, and, in some instances, tolerated the practice in order to meet budget requirements; (3) that some MEI employee time cards were altered by supervisors; and, (4) MEI failed to provide clear information about how employees' wages were calculated. The testimony, however, does not fit neatly into those general categories and usually witnesses combined several factual circumstances in one answer. A sampling of the witnesses' testimony follows:

1. **Isaac B. Moffett.** Mr. Moffett admitted that, throughout his employment, he did not follow MEI's written policy that required employees to keep accurate track of all the hours he worked. In 1999 MEI warned employees that there would be no overtime and if overtime was claimed there would be negative consequences. Mr. Moffett testified:

Q. Can you tell me what those things are?

A. A. Termination. They could fire you on the spot for it. Secondly, they would say when the calls start slacking -- and it gets to the point where there's hardly any calls coming in the spring and summer -- they'll lay off

people. And they will take a look at your performance versus your hours. The one who can perform the most with the least amount of hours will keep a job, and the other ones won't.

Q. Do you recall if that was written or was that told to you by your supervisor?

A. Told to me by a supervisor.

Despite these threats, Mr. Moffett continued to work hours he did not record. He gave several reasons for this:

"One is they -- they said it here -- expect you to do something different on this hand. They'd set the goals so high you had no choice but to work the hours. The sales were coming in. They couldn't man the phones. There wasn't enough people to answer the phones. And as long as you were producing, they act like you weren't even there. As long as you were producing.

And for us, the more computers we sell, the more services we sell, the bigger the commission. So just for myself, I just, well, I don't get the overtime, but I'm going to make a heck of a good commission."

While none of Mr. Moffett's supervisors ever explicitly told him not to record his overtime hours, implicitly they encouraged him to do so. Mr. Moffett explained the response from one of his supervisors, Greg Goodman, "I brought it [not recording overtime hours] up to Greg. Greg says, 'I'm not going to tell you to do anything. I want performance. You do what it takes.'"

Mr. Goodman was also quoted as saying, "'Guys, no overtime. You can't be writing overtime.'" and "'Aren't you supposed to be home by now?'" When the sales representatives pointed out the benefits of staying later, Goodman responded by saying, "'Don't get me in trouble.'"

Mr. Moffett testified that he never directly told Mr. Goodman he wasn't recording hours of overtime he was working, but, the two knew what was happening. Mr. Moffett at one point told Mr. Goodman, "Let me know if it's getting a little hot for you, but I don't mind putting in the time not claiming it if I get the sales." To which Mr. Goodman told Mr. Moffett not to get Mr. Goodman in trouble.

The rationale for off-the-clock work is best explained by Mr. Moffett's testimony:

Q. But you told me that, because of the job requirements, that you wanted to keep your job, and because of the commission, that you chose to work overtime; is that correct?

A. Because we wanted to keep our job, we had to meet the goals, we had to show performance with the least amount of time for the future selection, and we -- "we" as in the few of us that talked about it -- essentially justified us turning our backs on the overtime because the potential for commission.

Q. That was your choice to do that?

A. No. Keeping a job isn't my choice.

Q. You chose to work -- you chose to work the overtime?

A. I chose to keep my job.

(Isaac Moffett Deposition, Vol. 1, P.71, l. 12 - P.73, l.21; P.74, l.22-25; P.75, l. 2 - 16; P.75, l. 20 - P. 76, l. 9, and P. 85, l. 10 - P.86, l. 9, which excerpts are attached as Exhibit A, to William H. Thomas Affidavit).

2. **Jeffrey R. Parrish.** Mr. Parrish admitted that he did not follow MEI's written policy that required employees to accurately record their hours. During his employment at MEI one of his supervisors was Jaime Nava. Mr. Parrish discussed the fact that he was not complying

with time-keeping policies with Mr. Nava on several occasions. Mr. Parrish described one such conversation as follows:

A. After being told that we were not allowed to get any more overtime, the discussion was, on my end, to Jaime Nava there are times that I need to work over -- outside the parameters of the eight hours in order to get business done. And his reply, not in so many words -- I cannot remember exactly what he said -- was, "Do what you have to do to build your business."

Q. Did he tell you to work overtime and not record it?

A. In those terms, no.

Q. In any terms?

A. In any terms, yes.

Q. How so?

A. I was responsible for metrics on my team concerning call time, concerning number of dials, concerning a monthly goal of revenue, a monthly goal margin. In discussing those goals and those metrics, I was told to do what I needed to do to meet those.

Q. Had you requested overtime in order to be able to do those things? Is that what you're telling me?

A. At the time I did not request overtime. I was willing to put in that time because commission was more important to me than my hourly base salary. And in my mind the ends justified the means.

(Jeffrey R. Parrish Deposition, P.53, l. 23 – P. 54, l. 3; P. 55, l. 17 – P. 56, l. 20; P.58, l. 10 – P. 59, l. 12, which excerpts are attached as Exhibit B, to William H. Thomas Affidavit).

3. **Carren Seibert-Mattson.** In her testimony, Ms. Seibert-Mattson recalled Mr. Nava saying that an employee was not "allowed to submit a time card for over 40 hours and that [if one was submitted] it would be changed to reflect only 40 hours."

She also testified that her supervisor, Mr. Nava, despite a no-overtime policy, knew that she was working off the clock. As a matter of fact, the topic was one that MEI employees joked about with Mr. Nava. Ms. Seibert-Mattson testified:

A. [Mr. Nava] would just joke, "Get back to work, Mattson," and I would say, "You know, well, I'm probably past 40 hours now." And he'd say, "Don't you have something to do?" that kind of thing. I don't remember exact words, but that's what –

Q. And it's your understanding that even though you just said you were joking, that your understanding is that you think he knew that you were –

A. He had to have known. If someone sits there from 7 o'clock or 7:30 in the morning to 5 o'clock in the evening or 5:30 in the evening and doesn't ever leave, you have to know that that person is working more than 40 hours a week. It would be hard for him not to know.

She also testified that she was aware that sales representatives were reprimanded for recording too much overtime.

(Deposition of Carren Seibert-Mattson, P. 55, l. 15 – 19; P. 65, l. 8 – 22; P. 80, l. 10 – P.81, l. 20, which excerpts are attached as Exhibit C, to William H. Thomas Affidavit).

4. **Laurie McGeorge.** Ms. McGeorge's supervisor, Tony Robinson, told her that "higher management than himself would not allow more than 45 hours a week."
(Deposition of Laurie McGeorge, P. 24, l. 18 - 23, which excerpts are attached as Exhibit D, to William H. Thomas Affidavit).

5. **Jeffrey Clevenger.** Mr. Clevenger's testimony provides another example of the intentional disregard MEI managers displayed for complying with the FLSA.

Q. When you say not being compensated for it all, were you recording all of the overtime that you were working? We're talking about Mr. Church [Jay Church, Mr. Clevenger's supervisor] now.

A. I was recording what I was -- what the -- how do I say this? I was recording what was expected of me to record.

Q. I'm confused, because you've told me earlier that you thought you reviewed your timesheets before you submitted them to make sure they were accurate; is that --

A. Correct.

Q. But now are you telling me something different?

A. Nope.

Q. Okay. Tell me what I'm missing.

A. I'm saying that there was an unwritten law -- I don't know how you term the thing -- that you were to finish a full day's work as much as possible, even if that meant staying late and doing whatever it took to get the job done. Now, I worked all those hours and I wasn't ever compensated for all of them.

* * *

Q. And are you talking about when you -- Mr. Church was your supervisor or are you talking about the whole term --

A. Just in general. The whole time. It would fluctuate, I remember. Sometimes they would be approving overtime and then sometimes they wouldn't be approving overtime, but everyone was working overtime regardless of the fact.

Q. When you say "everyone," are you talking about your team?

A. I'm talking about the people -- yeah, most of my time -- the ones that were there that were competitive that were -- that were there to make money and keep their job.

(Jeffery Clevenger Deposition, P. 63., l. 19 - P. 65, l. 18, which excerpts are attached as Exhibit E, to William H. Thomas Affidavit).

6. **Marilyn Craig.** Ms. Craig was a sales representative at MEI's Minnesota facility. Her experiences regarding overtime abuse were the same as those employees in the Meridian, Idaho call center.

Q. Is it your belief that Micron failed to calculate overtime pay correctly?

A. Yes.

Q. And what is that belief based on?

* * *

A. I believe they failed to calculate overtime pay correctly because we had supervisors telling us to go ahead and do whatever it takes to get the business working overtime. But yet when it came time to actually input these, you know, sometimes they were changed, we weren't -- we didn't feel comfortable inputting all of our overtime hours. They knew we were working overtime and they knew we weren't getting paid for it.

Ms. Craig also testified that her supervisor, Lori Chitwood, knew that MEI was violating the FLSA by allowing sales representatives to work off the clock. In addition, she explained that ZEOS, a computer manufacturing company purchased by MEI, had been sued for FLSA violations, and that fact heightened her supervisor's concerns about the illegality of MEI's overtime practices. She testified:

Q. Does that refresh your memory about how you used VAX to keep track of your time?

A. Well, here it says you put your total daily hours worked in there, so evidently you don't put your stop and start time. Even though it says this, my supervisor Lori Chitwood would come around and say you have to get this done. You know, she would not approve the overtime, yet she would say you have to get this done. I also worked with an outside rep, Jeff Holds who would come in around 4:00 every day after visiting with

customers and leave me with tons of work to do, which I would have to stay and get done or come in early the next day or work my lunch hour to get all this work done. But we were never reprimanded, you know, for working overtime. My supervisor Lori Chitwood -- another hand would come around when -- you know, it would start to bother her and say, "You guys know I'm going to be going to jail for this if you work overtime and are not getting paid for it." And she knew better because ZEOS -- by the time I came to ZEOS they were sued for not paying wages, people working overtime and not getting paid for it.

(Marilyn Craig Deposition, P. 151, l. 18 - P. 152, l. 5; P. 60, l. 24 - P. 61, l. 18; Vol 2, P. 25, l. 12 - P. 26, l. 6, which excerpts are attached as Exhibit F, to William H. Thomas Affidavit).

7. **T. Scott Wells.** Mr. Wells testified extensively about his off-the-clock work and MEI's failure to compensate him for that time. He explained at length about a customer data base that he developed during off hours for his work at MEI and that his supervisor should have known of the time he spent in developing it. In addition, Mr. Wells testified that it was impossible for him to determine whether or not MEI paid him, as well as other employees, overtime based on the commissions the non exempt sales representatives received. An excerpt of his testimony is as follows:

A. Well, I wasn't compensated at one and a half times the regular rate of pay for all hours actually worked in excess of 40 hours in a scheduled work week.

Q. And we've talked about that in terms of the hours that you say you worked off the clock and not being compensated for the ones you didn't record. Correct?

A. That's right. That seems to be covered here in C.

Q. Just so we're clear, the overtime hours that you did record, you were paid time and a half. Correct?

A. On the wage, yes. On the commission, I don't know.

Q. What do you mean on the commission?

A. Well, my understanding is that you were to be paid overtime commission, and Micron never broke that out as a separate number. Except perhaps my first month or two in the sales department I think they may have done that. I haven't looked at those documents lately.

Q. Do you know whether or not you did receive overtime compensation with respect to commissions?

A. I don't know.

Mr. Wells also explained the difficulties he had in computing this aspect of MEI's employees' compensation as follows:

Q. Do you recall doing the computation method when you discovered about this lawsuit?

A. Okay. You mean after working for Micron?

Q. Yes.

A. After leaving Micron.

Q. Yes.

A. I did attempt to recreate a method of computation.

Q. And that was the third time, then, at least that you can remember now that you tried to replicate it. Correct?

A. Okay. Yes, if you are talking about after employment it would be that third time.

Q. Other than the three times that we're talking about, did you try to replicate it any other time?

A. No.

Q. Let's talk about the third time. That would be the most recent. Correct?

A. Yes, that would be.

Q. Do you know when did you that?

A. Last summer.

Q. And what was the result of that check on the computation method?

A. It was inconclusive.

Q. What do you mean by inclusive?

A. Well, it was difficult to calculate because the days of the week that they start tracking it and then also the hours worked were not the same weeks and not the same pay periods, not the same months. It was just a daunting task to try to figure it out. So I gave it my best shot. I couldn't get the numbers to jive very well. So I don't know.

Mr. Wells also was able to clearly articulate the tension created by MEI when hourly employees were given high sales goals and, at the same time, forbidden to record certain overtime.

Q. The company didn't tell you not to record your overtime?

A. I don't know. I don't know. I think that as you continue to expand on that, I think it goes a little bit over the line of reality.

Q. I don't understand what you just said. Tell me what you mean.

A. Well, you continued to nail that down regarding the company policy on overtime and what this means, what this doesn't mean. And in the context of working through the situation, you could take it as, well, I want to continue to make my commissions, so I'm going to work off the clock. Or you could take it as, well, I'm not going to be able to report my overtime, and so I'm not going to work overtime.

It would depend on how driven you are. Are you driven to make those commissions anyway? Is that something that's going to be desirable in the company's eyes anyway for you to do that to continue working those hours? Well, yes, they wanted to make the money. They wanted the company to sell product.

What this essentially was telling me was that the cost of the company paying overtime was getting excessive, and that they wanted us, by

whatever means, to not be paid so much for overtime hours. Whether that meant simply don't work those hours, or whether you could take that as the salesman you are of I'm going to work it. I need the commissions. I'm not going to be able to manage all these accounts without working overtime. And for them to realistically expect me to produce, I'm going to have to do the time.

Many of the deponents were questioned at length about why supervisors should not be permitted to assume that time records submitted by employees were accurate upon submission, implying that there was no other way to verify whether an MEI sales representative actually worked the hours claimed. Mr. Wells explained the other means by which a supervisor could cross-check the accuracy of time records to determine whether an employee was in any way submitting inaccurate records. He testified:

- Q. I originally had asked you about whether or not a supervisor -- and let's say Tawni Weaver in 2001, a supervisor you had then. Shouldn't have Ms. Weaver been able to assume that before you submitted your timesheet that you had reviewed it to ensure it was accurate?

* * *

THE WITNESS: I don't know. I think that's a stretch simply because there's no way that a supervisor could not have known of the off-the-clock hours people were working. There's just no way. It's just impossible.

- Q. BY MR. DOCKSTADER: What do you mean?

- A. Well, first of all, if they had maintained -- I don't know if they have. Maybe they have. Maybe you can produce it. Did they maintain those records on the call volumes and the call times, the call history, the centerview data? Did they take that into account? Did they look at those data? Because there were people that were reporting apparently 40 hours a week, and they're centerview time was easily up over 50. How could a supervisor overlook that?

- Q. Their what time? Centerview time?

- A. Centerview data.

Q. What is that?

A. It is call center data on the telephones that it records inbound calls, outbound calls. And I don't remember exactly how detailed it got because it was only when I was in technical support that I was really detailed into that when I created the centerview data spreadsheet. That used by technical support. The data certainly showed aux time. That's auxiliary. It showed ACD time. That's Automatic Call Dispatch, or something like that, ACD. And I don't recall what the other one was called. There was the time which was aux time, and then there was the ACD time, and then there was the in between, After Call Work, ACW. And it recorded all of those, and it recorded time you were actually in the call, on a phone call.

(T. Scott Wells Deposition, P. 112, l. 9 - P. 126, l. 14; P. 141, l. 3 - P. 142, l. 3; P. 151, l. 7 - P. 152, l. 16; P. 210, l. 12 - P. 211, l. 20; and, P. 168, l. 15 - P. 170, l. 7, which excerpts are attached as Exhibit G, to William H. Thomas Affidavit).

8. **Jarame M. Ell.** Mr. Ell admitted to violating MEI's written policy on timekeeping by not recording all the hours he worked. He testified that he worked off the clock on a daily basis. He also testified that his supervisors should have known he was violating the policy because they saw him during non-office hours. In addition he testified:

Q. If I understand your testimony pursuant to Mr. Dockstader's questions, you worked off the clock for every one of your supervisors?

A. That is correct.

Q. Can you think of any way that any one of those supervisors could have determined that you were working off the clock?

A. Phone records, security badge, or if they would have asked me.

(Jarame M. Ell Deposition, P. 47, l. 17 - P. 49, l. 25 and P. 134, l. 10 - 18, which excerpts are attached as Exhibit H, to William H. Thomas Affidavit).

9. Jacqueline Hladun. Ms. Hladun was a sales representative in the Minnesota facility. Under her supervisor, she was required to turn in the hours she had worked during the week to an administrative assistant, Donna Mertig. This information was passed on via a weekly email. Ms. Mertig would then input the hours. Ms. Mertig reported to the general manager. The hours that were credited were infrequently the hours actually worked. Ms. Hladun explained:

Q. Let's go back to these e-mails that we were talking about before that you sent to Ms. Mertig. Earlier you were saying the e-mails you would note on an extra line that there were additional hours and even on some trips to Boise, Idaho for business she inputted and recorded whatever the hours were and not to put times. Can you explain those statements a little bit for me?

A. For instance, on the trips to Idaho we would generally have to travel on the weekends. And she would actually clearly state that you were only paid for X number of hours at that point. And that was all that was allowed.

* * *

Q. So you don't think that you were paid for all the time that you worked during those trips to Boise?

A. Considering the trips were on weekends and travel time, no.

* * *

Q. Okay. So putting aside the Boise trips, during the regular work periods, what do you mean by you would note on an extra line that there were additional extra hours?

A. I would note on an extra line stating I came in early, left late and did not take lunch.

Q. So the e-mails you would have for each day of the week you would have the total hours that you recorded for that day, but then you would also have an extra line on some of the e-mails where you say that you came in early and worked through lunch? I'm trying to understand what the extra line would say.

- A. It wasn't a daily e-mail. It was one e-mail. And I would like on a little note state, you know, I was in early or late and did not take lunch, you know, for the week.
- Q. But you didn't say that the e-mail didn't include all of your time that you had worked for that week?
- A. It did not include the correct time because they said that only 40 hours or at the maximum of 45 hours were going to be inputted.

* * *

- A. I would put, you know, "Donna, I came in 7:00 a.m. and left at 7:00 p.m. and had no lunch." And for the trips on Boise, since it was on weekends that we took those trips, you know, I would say, okay, travel time. And you know how long it takes to Boise. In addition to that it was, you know -- we were gone for these trips X number of hours. And many of the times those Boise trips, we had to be ready by 6:00, 6:30 in the morning and did not return at night until after 10:00 or 11:00. However, she recorded eight hours.

Ms. Hladun also testified that sales representatives complained that their pay with regard to commissions was not being properly calculated. In response a meeting was called in late 1999. MEI provided no information and the issue died on the vine. Ms. Hladun testified:

- Q. But you do remember attending this particular meeting?
- A. Yes.
- Q. And at this meeting was this issue discussed that people were not being paid for all the overtime they were working?
- A. Yes, there were questions on the hourly rates and then the targeted incentives and how they were calculated, as noted in the agenda.
- Q. How does targeted incentives relate the fact that people claim they weren't being paid for the overtime they were working?
- A. We understood that upon receiving commissions, if you achieved a certain percentage, then your hourly rate had an incremental increase also in

addition to the overtime -- well, the overtime had the incremental increase.

Q. That if you achieved a certain commission you would make more money in overtime?

A. Yes.

Q. Okay. Do you remember specifically what was said at this meeting about people claiming that they weren't getting paid for all the overtime they were working?

A. I don't remember specifically. We did note that the majority of the sales reps had to work overtime and we were not being allowed to place more than 45 hours for the overtime. And we also questioned if those were accurately recorded in our commission payment.

Q. I'm sorry, you questioned if what were accurately recorded in your commission payment?

A. If we received correct commissions and then if we received the correct commission incremental increase in the overtime also.

Q. Okay. I see. And of those issues you just discussed, did Jennifer have any response to those?

A. No. The only response was to set up additional meetings. And then I believe in January she went on maternity leave. There was no real finalization on any of this.

(Jacqueline Hladun Deposition, P. 40, l. 15 - P. 41, l. 10; P. 46, l. 12 - P. 49, l. 7; and, P.65, l. 23 - P. 67, l. 11, which excerpts are attached as Exhibit I, to William H. Thomas Affidavit).

10. Kimberley Smith. Ms. Smith admitted that she did not follow the written policies of MEI and failed to record all of her overtime hours and did not get prior approval for overtime. On occasions when she did record what was considered too much overtime she was reprimanded because the overtime hours came out of her supervisor's budget. She said

- Q. Were you verbally reprimanded for recording too much overtime?
- A. Yes.
- Q. When?
- A. I don't know the specific dates.
- Q. Did you get paid for the overtime?
- A. Yes.
- Q. And what was the basis for Mr. Nava reprimanding you for recording too much overtime?
- A. That I had worked too much overtime in his opinion.
- Q. During that period of time, were there limits on the amount of overtime that reps could work?
- A. I don't recall.
- Q. For what reason would he have to get upset with you if you were working too much overtime?
- A. Came out of his budget.
- Q. Is that what he told you?
- A. Yes.

(Kimberley Smith Deposition, P. 267, l. 15 - 16; and P. 402, l. 25 - P. 403, l. 20, which excerpts are attached as Exhibit J, to William H. Thomas Affidavit).

11. **David Thom.** Mr. Thom worked in the Meridian MEI sales office. He testified that Jaime Nava, his supervisor told Mr. Thom and other employees they were only allowed a limited number of overtime hours but later agreed that Mr. Thom would work more but only request payment for the authorized amount. Mr. Thom believed it was more important to earn a commission. His testimony follows:

Q. Did anybody induce you to do that, to work off the clock?

A. No. I mean, we had a meeting one time with Jaime Nava. He said you can only work four to five hours, something like that. And, you know, it seems like he said something about -- I don't remember exactly --but it was something like, you know, if you need to work a little extra to get things done, to get more computers sold, then that's okay. And so I think I pulled him aside later, I think I said, I don't care about the overtime anyway 'cause it's not that much money. There's more money in the commission, you know. And he says, basically he says, okay, but you know you can only put down 45 hours right now. We might get more later or something.

Q. Did that induce you to work overtime off the 24 hour clock?

A. It made me feel more comfortable about it; that I wouldn't get in trouble for it.

(David Thom Deposition, P. 65, l. 8 - P. 66, l. 1, which excerpts are attached as Exhibit K, to William H. Thomas Affidavit).

12. **Timothy Kaufmann.** Mr. Kaufmann was so told that despite a limit on the number of overtime hours he could claim, he needed to work more and not claim that time -- an intentional FLSA violation. Mr. Kaufmann's testimony was:

Q. What led you to start doing it in 1997?

A. Inability to get all of your work done on an 8:00 to 5:00 day.

Q. Did you report overtime hours during 1997?

A. Some of them, yes.

Q. At what point did you decide to not report hours?

A. When I knew that Dominic may have -- Mr. Casey may have difficulty getting those other hours approved.

Q. And how did you know that?

A. Just a general rule of thumb. verbal conversations with Mr. Casey.

Q. Tell me about what verbal conversations you're referring to.

A. You know, Mr. Casey would have a meeting, say, you know, "Up to 45 hours is fine, you know, five hours of overtime a week, but you guys need to work more than that, it's going to be on your own time."

(Timothy Kaufmann Deposition, P. 56, l. 22 - P. 57, l. 17, which excerpts are attached as Exhibit L, to William H. Thomas Affidavit).

13. Alan Garcia. Mr. Garcia testified that he was not told that his commissions would increase his overtime pay, he said:

Q. Were you ever told that any commissions that you earned in a given month would increase the amount of overtime you were paid if you had worked overtime during that same month?

A. In those terms I don't recall any communication.

Q. Do you have any other understanding about whether there was any relation between the commissions that you earned and the overtime that you were paid?

A. Not that I can recall in this context if I'm understanding things correctly.

(Alan Garcia Deposition, P. 83, l. 10 - 21, which excerpts are attached as Exhibit M, to William H. Thomas Affidavit).

14. Ryan Keen. During Mr. Keen's initial employee orientation, one of the presenters explained how MEI paid overtime wages on commissions earned. After the orientation, Mr. Keen saw the computation on his pay stub, then it no longer was given as a line item on the explanation of his pay. He testified:

A. I would venture to guess I had 10 or 12 different pay plans over the two plus years I was there. I don't have an exact number. That's just a guess.

Q. I understand.

A. I also think the first pay plan may have mentioned how we got paid overtime, but I can't remember.

* * *

A. Jim [Watkins] said that we're going to be required to work a lot of overtime and weekends because we're so busy, but that's good because you'll make a lot of money on overtime. He said because overtime is -- they figure your commission on overtime, how many hours you work, your \$7 an hour, plus what you averaged on commissions per hour to get a rate that's, say, \$15 an hour, and you get time and a half of that.

Q. Plus some additional for the commission that you worked?

A. That's what I'm saying. If you took your hourly and what you made in commission, divided it up by how many hours you worked, it averaged you made \$15 an hour that month, you would get time and a half of that for your overtime.

* * *

Q. I see. So it was your understanding that if you worked overtime you would get paid additional depending on the amount of commissions you earned?

A. That's right. If you would have earned no commissions and worked 20 hours of overtime, all you would get is time and a half of your \$7 an hour.

Q. Got it. So he was telling you that in addition to the time and a half that you would get, you would also get an additional amount related to commissions. Is that right?

A. Right.

* * *

A. Well, it was my understanding that the overtime had changed. They weren't going to pay it based on the commissions anymore. It was just time and a half of your hourly.

Q. What was that understanding based on?

A. I don't remember.

* * *

Q. Do you know if, in fact, there was a change?

A. To the best of my knowledge I never received any overtime compensation with regard to my commission.

Q. But you did receive time and a half for your overtime?

A. On my hourly.

(Ryan Keen Deposition, P. 72, l. 8 - P. 77, l. 22, which excerpts are attached as Exhibit N, to William H. Thomas Affidavit).

15. **James Wells.** Mr. Wells was asked whether he accurately recorded his hours of work while an employee at MEI. He responded:

Q. Do you have any reason to believe that you did not accurately record the time you began and ended your work?

A. As the question again. I'm sorry

Q. Could you repeat the question for the witness please.\

(Record read.)

THE WITNESS: That's a hard question to answer.

Q. BY MR. DOCKSTADER: What's hard about the question?

A. Toward the end of my employment at Micron, we didn't use the VAX system. We had strict guidelines in place of what we had to get done in a day, and we also had several periods where we were not allowed to have unapproved overtime. So kind of a catch 22. You want to keep your job. You want to make sure that you have everything done in your allotted time period. You don't want to submit overtime if it's not approved, but

sometimes you had to stay a little bit later to get what you needed to have done in that day to meet your requirements to keep your job.

So did I not put all my time on time sheets? That happened occasionally.

(James Wells Deposition, P. 67, l. 17 - P. 68, l. 16, which excerpts are attached as Exhibit O, to William H. Thomas Affidavit).

16. **Michele Saari.** Ms. Saari worked in the Minnesota facility. She too worked overtime with no compensation. One of the reason given was that MEI was in financial trouble and there were budget constraints. She testified:

Q. You said earlier that this January of 1999 time frame was one of the times where we were working more hours than we were being paid for. Why were you working more hours than you were being paid for?

A. Because we were informed that there was a budget freeze, so we were not able to collect overtime or additional compensation.

Ms. Saari also testified that her supervisor encouraged his subordinates to work off the clock – they were to do it for the good of the company. She testified:

Q. Do you remember Mr. VanOrnum specifically saying that overtime wouldn't be paid if you worked it, or do you remember him specifically using those words?

A. He always had a lot of catch phrases, and one of them was take it for the team. And I don't remember him specifically saying, do not record your overtime, but it was understood that you were taking it for the team and for the betterment of the company, to increase production.

(Michele Saari Deposition, P. 41, l. 10 - 17 and P. 56, l. 17 - P. 57, l. 1, which excerpts are attached as Exhibit P, to William H. Thomas Affidavit).

17. **Kevin M. Henderson.** As a sales representative, Mr. Henderson reported to a supervisor who gave instructions in code words that Mr. Henderson understood to mean that he

was to work overtime and not claim it as part of his pay. Mr. Henderson testified:

Q. Do you have any knowledge of the company unlawfully inducing you to work off the clock?

A. I felt it was always kind of a written under law that we weren't there to work for our hourly wage, we were there to work for the commissions.

Q. Do you have any facts that would support an allegation that the company ever unlawfully induced you to work off the clock?

A. Do I have any proof besides personal knowledge?

Q. Yes.

A. No.

Q. What is your personal knowledge in that respect?

A. That I did the time.

Q. But specifically to the allegation that the company unlawfully induced you to work off the clock, what knowledge did the company ever unlawfully induced you to do that?

A. Just there would be times when Howarth [David Howarth, Mr. Henderson's supervisor] would come up to me, and there would be somebody new on the team. And he would make comments like, you know, "You need to get them on the program," things like that.

Q. "Get them on the program," what do you understand that to mean?

A. My understanding is that would be to – you're going to have to put in the extra time to get the job accomplished

(Kevin M. Henderson Deposition, P. 85, l. 17 - P. 86, l. 22, which excerpts are attached as Exhibit Q, to William H. Thomas Affidavit).

18. Dale Hope. A large portion of Mr. Hope's deposition testimony dealt with the problems he encountered with MEI's commission system. He constantly had problems getting

the correct amount and believed that the numerous changes to the methods of calculating the commissions were intentionally designed to reduce the commissions earned by high earning sales representatives. He was also surprised when he received an unknown increase in his commission. With regard to that he testified:

Q. What was your understanding of -- did you have an understanding as to why it was slightly higher in the paycheck?

A. It popped up and it happened just one month out of the blue. Nobody really knew what it was for. We started asking questions, and it was based on overtime hours that we had submitted, that somehow they had to apply that overtime to the commission, which didn't make sense to me. And the overtime when we did get paid overtime -- and this was much later down the road where this would show up, it was like it just showed up. And it didn't show up early on and I can't recall when they did start doing it, but that's how they explained it, that we got paid overtime on our commission, which everybody just kind of shook their head and really never understood how that worked.

(Dale Hope Deposition, P. 64, l. 7 - P. 71, l. 11 and P. 71, l. 20 - P. 72, l. 12, which excerpts are attached as Exhibit R to William H. Thomas Affidavit).

19. Tawni Weaver. Ms. Weaver was a Small Business/Web sales manager with Micron Electronics, Inc.¹ As a manager Ms. Weaver attended a meeting in early May 2001 at which she and a large number of other managers were given training on compliance with the FLSA. Ms. Weaver came away from that meeting with knowledge that MEI was not complying with the FLSA in a number of ways. For instance, in her affidavit she states that she "had personal knowledge that two Micron Electronics, Inc. Managers, Jaime Nava and Mark Auchampach, had improperly dealt with an employee's timecard." (Weaver Affidavit, Para. 6)

¹See "Affidavit of Tawni Weaver" submitted as Exhibit 18 to Affidavit of William H. Thomas in Support of Plaintiffs' Motion for Conditional Certification filed February 13, 2002, Docket No. 78.

Ms. Weaver also testified that employees were "not getting overtime for time worked off the clock" (Weaver Affidavit, Para. 7)

While the above testimony is only a brief catalog of some of the testimony of the witnesses, it provides direct and clear evidence that MEI consistently and knowingly violated the FLSA.

DATED this 14th day of July, 2004.

HUNTLEY PARK, LLP

A handwritten signature in black ink, appearing to read "Wm H Thomas", is written over a horizontal line.

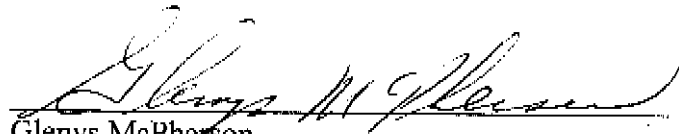
William H. Thomas
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2004, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

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☐ Via Hand Delivery
☐ Via Facsimile 389-9040
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Glenys McPherson